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No. 02-739

In The
Supreme Court of the United States

KIRBY INLAND MARINE, INC. OF MISSISSIPPI, a/k/a BRENT TRANSPORTATION COMPANY, *in personam* and the M/V MISS DIXIE, its engines, tackle, fixtures and appurtenances, etc., *in rem*,

Petitioner,

v.

UNION PACIFIC RAILROAD COMPANY,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

UNION PACIFIC'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Does A Truman-Hobbs Act (33 U.S.C. §§ 511-524) Order To Alter Which States "The Clinton Railroad Drawbridge Is An Unreasonable Obstruction To The Free Navigation Of The Upper Mississippi River" Change Admiralty Law To Make The *Oregon* Presumption Of Ship's Crew Negligence Inapplicable When A Vessel Strikes A Truman-Hobbs Act Bridge?

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STATUTES AND REGULATIONS INVOLVED

A. The following statutes and regulations are set out verbatim in the Union Pacific Cross-Petition Appendix:

Sections 401, 406 and 502 of *Subchapter I* of Chapter 11 of Title 33, U.S.C., from the Rivers and Harbors Act of 1899.

Section 494 of *Subchapter I* of Chapter 11 of Title 33, U.S.C., from the Bridge Act of 1906.

Sections 511, 512, 513, 516, 518, 519 and 522 of *Subchapter II* of Chapter 11 of Title 33, U.S.C., from the Truman-Hobbs Act of 1941.

Sections 114.10, 114.30, 114.40 and 116.01(e) of 33 C.F.R.

B. The following statutes and regulations are set out verbatim in the Appendix to this brief:

Sections 491 and 495 of *Subchapter I* of Chapter 11 of Title 33, U.S.C., from the Bridge Act of 1906.

Section 116.30 of 33 C.F.R.

STATEMENT OF THE CASE

This case was submitted to the District Court on stipulated facts. On May 5, 1996, Kirby's vessel, the M/V MISS DIXIE and/or its tow of barges struck Union Pacific's Clinton Railroad Bridge. Union Pacific brought this action alleging damage to its bridge was caused by negligence of the crew of the M/V MISS DIXIE and/or by the unseaworthiness of that vessel. Kirby denied its crew was negligent or its vessel was unseawothy, alleged that Union

Pacific itself was negligent in the construction, design, care and maintenance of the Clinton Railroad Bridge, and further alleged the defense of set-off for damage sustained by the M/V MISS DIXIE and/or its tow.

The Clinton Railroad Bridge was authorized by, and constructed and maintained in accordance with, permits issued by the United States Coast Guard (and formerly by the United States Secretary of the Army) pursuant to the Rivers and Harbors Act, 33 U.S.C. § 401. On the date of the allision (admiralty law term for a collision) the bridge was operated under these permits.

A separate federal act, the Truman-Hobbs Act, authorizes the United States Coast Guard to order bridge owners to alter bridges when they "unreasonably obstruct the free navigation of any navigable waters of the United States." 33 U.S.C. §§ 511-524. On February 28, 1996, the United States Coast Guard had issued a Truman-Hobbs Order to Alter, finding that the Clinton Railroad Drawbridge "is an unreasonable obstruction to navigation . . . ".

The *Oregon* rule is a long-standing principle of judge-made admiralty law that raises a presumption that a vessel's crew is negligent when a vessel strikes a stationary object such as a bridge. *The Oregon*, 158 U.S. 186, 197 (1895). The District Court held the issuance of a Truman-Hobbs Act Order to Alter " . . . eliminates any presumption of crew negligence that may otherwise have existed." In reaching this result, the District Court also held, "The Coast Guard findings are admissible under Federal Rules of Evidence 402 and 803(8)(C)."

The Eighth Circuit Panel reversed the District Court's holding that the *Oregon* presumption of ship's crew negligence did not apply to an allision with a bridge for which

the Coast Guard had issued a Truman-Hobbs Order to Alter. *Union Pacific Railroad Company v. Kirby Inland Marine, Inc., of Mississippi*, 296 F.3d 671, 674-675 (8th Cir. 2002). However, the Panel went on to also hold that the Coast Guard Order to Alter, stating that the Clinton Railroad Bridge was "an unreasonable obstruction to navigation . . . ", was admissible evidence in a negligence action for damages. *Id.*, at 679-680. Union Pacific has filed a cross-petition for writ of certiorari challenging that evidentiary ruling by the Panel.

REASONS FOR DENYING THE PETITION

I. THE DECISION BELOW BY THE EIGHTH CIRCUIT COURT OF APPEALS DOES NOT CONFLICT WITH THE DECISION OF THE SEVENTH CIRCUIT COURT OF APPEALS IN *I & M RAIL LINK, LLC V. NORTHSTAR NAVIGATION, INC.*

The Eighth Circuit Court of Appeals opinion below discusses at length the Seventh Circuit's decision in *I & M Rail Link LLC v. Northstar Navigation, Inc.*, 198 F.3d 1012 (2000), *rehearing denied*, 205 F.3d 333 (7th Cir. 2000), *cert. denied*, 531 U.S. 917, 121 S.Ct. 276 (2000), *on remand*, 2001 WL 460028 (N.D. Ill. 2001). *Union Pacific Railroad Company v. Kirby Inland Marine, Inc. of Mississippi*, 296 F.3d 671, 676-678 (8th Cir. 2002). The eighth Circuit Panel's opinion points out that in *I & M Rail* the district court entered judgment for the railroad on a motion for summary judgment. *Union Pacific*, 296 F.3d at 677; *see*, *I & M Rail*, 198 F.3d at 1013, *rehearing denied*, 205 F.3d at 334. The Eighth Circuit Panel said its opinion did not conflict with the Seventh Circuit's *I & M Rail*

decision because the Seventh Circuit there held only that "a Coast Guard Order to Alter is not conclusive evidence of negligence, but merely another piece of evidence which the *trier of fact* may consider in determining fault in a negligence action." 296 F.3d at 677.

The Seventh Circuit held in *I & M Rail* that the Coast Guard report including the order to alter was admissible and that the report was sufficient in that case to create a fact question. 198 F.3d at 1015, *rehearing denied*, 205 F.3d at 334-335. For summary judgement purposes the facts had to be interpreted in favor of defendant Northstar. The Seventh Circuit simply held that the trier of fact could find for Northstar. It did not hold the Coast Guard report was conclusive. The Seventh Circuit did not hold that at trial the vessel would not have the burden of proof as the *Oregon* rule dictates. The Seventh Circuit explained in *I & M Rail* at 205 F.3d 34-35:

> Seaboard likewise was decided after a trial. The Secretary of War had ordered the bridge's span to be increased so that the Port of Savannah could accommodate larger oceangoing vessels. This did not imply that the bridge posed safety hazards to the smaller vessels that had long been using the port. Moreover, the court of appeals did not conclude that a renovation order should be ignored; it held, instead, that such an order is not conclusive on the trier of fact, not only because it is issued ex parte but also because it does not establish that a particular shortcoming caused a given allision. We reached the same conclusion: the facts underlying the Coast Guard's decisions concerning the Sabula Bridge imply that shortcomings in its design may have played a causal role in the allision, but whether this is so (indeed, whether the design is deficient) is for the trier of fact.

On remand, the District Court for the Northern District of Illinois, at 2001 WL 460028, p. 4, explained:

> The court also does not read the Seventh Circuit's opinion as a short cut around this analysis. It is true that the Seventh Circuit referred to the previous accidents at the Sabula Bridge included in the Coast Guard's reports, and said the trier of fact may find the Sabula Bridge an unreasonable obstruction based on the Coast Guard's cost and accident data. See id. at 1015-16. But it did so in the context of explaining its holding on a rather narrow issue: that this evidence could be used to rebut the presumption of The Oregon, 158 U.S. 186 (1895). The court simply did not address whether these other accidents were "substantially similar" to the May 1997 allision so as to be admissible at trial. And it is unlikely the court intended its holding either to completely do away with, or act as a substitute for, a finding of "substantial similarity."

The issue before the Eighth Circuit Panel was whether enactment of the Truman-Hobbs Act was intended by Congress to change the judge-made *Oregon* rule that a vessel's crew is presumed negligent when the vessel strikes a bridge. The Act clearly did not make such a change in existing judge-made law and neither the Seventh Circuit nor the Eighth Circuit so held.

II. THE TRUMAN-HOBBS ACT DOES NOT EVIDENCE ANY CONGRESSIONAL INTENT TO WORK A CHANGE IN THE JUDGE-MADE ADMIRALTY NEGLIGENCE LAW RULE THAT A SHIP'S CREW IS PRESUMED NEGLIGENT WHEN A SHIP STRIKES A STATIONARY STRUCTURE.

A. A Proposed Construction Of A Statute Which Is In Derogation Of Judge-Made Law Will Be Strictly Scrutinized, And Whenever Possible A Construction Of The Statute That Changes Longstanding Judge-Made Law Will Be Rejected.

"Where, indeed, the expressions in an act of Assembly are in general terms, they are to receive a construction that may be agreeable to the rules of common law in cases of a similar nature." *Leving v. Will*, 1 U.S. 430, 434 (1789). A statute " . . . in derogation of the common law . . . is to be taken strictly." *Brown v. Barry*, 3 U.S. 365, 367 (1797). The rule was also endorsed in *Shaw v. Railroad Company*, 101 U.S. 557, 565 (1879):

> "No statute is to be construed as altering the common law, farther than its words import. It is not to be construed as making any innovation upon the common law which it does not fairly express."

This rule is alive and healthy today. In *United States v. Texas*, 507 U.S. 529, 534 (1993), the Court instructed:

> Just as longstanding is the principle that "[s]tatutes which invade the common law . . . are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the

> contrary is evident." [Citation omitted] In such cases, Congress does not write upon a clean slate. Astoria, supra, at 108, 111 S.Ct., at 2169-2170. In order to abrogate a common-law principle, the statute must "speak directly" to the question addressed by the common law. [Citation omitted]

Accord: Robert C. Herd & Company v. Krawill Machinery Corporation, 359 U.S. 297, 363-65 (1959); *Norfolk Redevelopment & Housing Authority v. Chesapeake & Potomac Telephone Company of Virginia*, 464 U.S. 30, 35-36 (1983).

B. The Truman-Hobbs Act Does Not Evidence Any Congressional Intent To Financially Penalize Through Negligence Damage Actions A Railroad Or Government Highway Authority For Failure To Reconstruct With Its Own Funds A Bridge That Is The Subject Of A Truman-Hobbs Order To Alter.

Union Pacific's Clinton Railroad Bridge operates under permits issued by the United States Coast Guard (and formerly by the United States Secretary of the Army) under 33 U.S.C. § 401 (Rivers and Harbors Act) and 33 U.S.C. § 491 (Bridge Act of 1906). Those sections provide that it is unlawful to construct a bridge over a navigable river without Congress' statutory consent and approval of the plans by the Secretary of Transportation. Section 406 of Title 33 provides that every person or corporation violating Section 401, 403 or 404 of Title 33 can be punished by fine and/or imprisonment, and that removal of the offending structure can be enforced by federal court injunction.

3 C.F.R. § 114.10 provides:

> The decision as to whether a bridge permit or a draw bridge operation regulation will be issued or promulgated [under 33 U.S.C. § 401] must rest primarily upon the effect of the proposed action on navigation to assure that the action provides for the reasonable needs of navigation. . . .

33 C.F.R. § 114.30 provides:

> Permits may be revoked by the issuing official for failure on the part of the permittee to comply with any of the conditions therein, or where the structures or other work constitute an unreasonable obstruction to navigation. . . .

33 C.F.R. § 114.40 provides:

> The Coast Guard has the authority and responsibility for enforcement of the applicable provisions of law for the protection and preservation of navigable waters. It is the policy of the Coast Guard to secure compliance with these provisions of law short of legal proceedings. As a general principle, no action is taken when the violation is minor, unintentional, or accidental and the party responsible corrects the violation. It is the policy of the Coast Guard to implement civil or criminal proceedings in all other circumstances. . . .

The clear intent of 33 U.S.C. §§ 401, 406 and 491, and the implementing agency regulations, is to grant to the owner of a bridge who complies with the statutes and regulations the right to operate the bridge as presently constructed. The Coast Guard has the power to levy fines, institute civil and criminal proceedings, and obtain a court injunction to remove all or part of a bridge structure, if a bridge owner does not comply with these statutes and

regulations. The Union Pacific's Clinton Railroad Bridge has not been the subject, either before or after the issuance of the Truman-Hobbs Order to Alter, of any fines, civil or criminal proceedings, or Coast Guard or court orders to remove any part of the bridge structure (other than the Truman-Hobbs Order itself). There were no plans approved for any reconstruction nor any completion date set.

The Truman-Hobbs Act has a purpose entirely different from determining whether the *design and construction* of a bridge at any particular point in time is lawful. The purpose of the Truman-Hobbs Act is to make available a process whereby the *alteration* of a bridge to make it more beneficial to the navigation industry *can be accomplished by use of federal funds* which subsidize the barge industry. 33 U.S.C. § 516; House Report No. 1447, August 2, 1939, 76th Cong., 1st Sess. (accompanying 54 Stat. Chap. 409, §§ 1-3, June 21, 1940).

In the case of a Truman-Hobbs bridge (one owned by a railroad or public highway authority), the Order to Alter does not set out any time-frame within which the alteration must be accomplished. This is because completing an alteration depends upon various actions to be taken by the government, not the least of which is a special appropriation by Congress for the alteration to the specific bridge that is the subject of the Order to Alter. 33 U.S.C. § 518. Rivers and Harbors Act *orders to alter for non-Truman-Hobbs bridges do set a time for completion.* 33 U.S.C. § 494. Section 116.01(e) of 33 C.F.R. provides:

> (e) If the Coast Guard determines that alterations to a bridge are necessary, the Commandant, U.S. Coast Guard, will issue to the bridge owner an Order to Alter containing details of the alterations

necessary to render navigation through or under the bridge reasonably free, easy, and unobstructed.

(1) *In the case of a railroad or publicly owned highway bridge, an Order to Alter is issued to the bridge owner under the provisions of the Truman-Hobbs Act (33 U.S.C. 511 et seq.). In ordering these alterations, the Coast Guard will give due regard to the necessities of free and unobstructed navigation and of rail and highway traffic.* For alterations to bridges governed by the Truman-Hobbs Act, *the Coast Guard must approve* general plans, specifications, and contracts for the alteration project, as well as approving *the apportionment of the total cost of the alterations between the United States and the bridge owner.*

(2) *For all other bridges, the Order to Alter will contain the required alterations for the bridge and will prescribe a reasonable time in which to accomplish the required alterations. The bridge owner is responsible for the entire cost of the required alterations.* [Emphasis added]

The Truman-Hobbs Act also provides for administrative penalties including fines and removal of the bridge, at the bridge owner's expense, as remedies for a bridge owner's noncompliance with orders issued under the Act. 33 U.S.C. § 519. No fine or other penalty has been levied, or other adverse action initiated, against the Union Pacific for failure to comply with any Truman-Hobbs order.

Section 494 of Title 33 (Chapter 11, *Subchapter I*) governs non-Truman-Hobbs bridge alterations. That section's first sentence grants authority to the Secretary to order alteration or removal of a bridge within a prescribed

time if the bridge "shall at any time unreasonably obstruct the free navigation of the waters over which it is constructed. . . . " Section 495 of Title 33 authorizes the Secretary to levy criminal fines and remove the bridge, enforceable by court injunction, if a bridge owner fails to comply with §§ 491-498 of Title 33.

Section 502 of Title 33 (Chapter 11, *Subchapter I*) grants the Secretary the authority to order alteration of a bridge if the Secretary "shall have good reason to believe that any railroad or other bridge now constructed, or which hereafter may be constructed, over any of the navigable waterways of the United States is an unreasonable obstruction to the free navigation of such waters. . . . " Section 502 requires the Secretary to prescribe a time in which the alteration must be completed, and if it is not so completed criminal and/or civil proceedings are to be commenced to levy criminal fines and/or civil penalties.

The Truman-Hobbs Act, at 33 U.S.C. § 522(a) (Chapter 11, *Subchapter II*), provides that the first sentence of § 494 and all of § 502 are "inapplicable with respect to any bridge to which the provisions of this subchapter are applicable. . . . " *Thus, § 494 orders to alter or remove bridges and prescribing the time period allowed to comply are not applicable to Truman-Hobbs bridges carrying railroad traffic, nor are the penalties and fines set out in §§ 494 and 502.* The only penalties or fines an owner of a Truman-Hobbs railroad bridge is subject to are those set out in 33 U.S.C. § 519 for violation of an order issued under *Subchapter II* of Chapter 11. Congress has expressed its intent that time requirements and fines and penalties contained in other federal statutes on bridges found outside *Subchapter II* of Chapter 11 are not to apply to the Clinton Railroad Bridge. When Congress has expressly done this, it

is illogical to contend that Congress secretly intended the enactment of *Subchapter II* to work a penalty on a railroad bridge owner by changing existing judge-made law so as to increase the railroad bridge owner's exposure to financial loss in vessel/bridge allisions.

The United States Supreme Court recognized in *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959), that damage awards are a form of regulation just like statutes and agency rules. The Court explained in *Garmon* at 359 U.S. 246-247:

> Nor is it significant that California asserted its power to give damages rather than to enjoin what the Board may restrain though it could not compensate. . . . Such regulation can be as effectively exerted through an award of damages as through some form of preventive relief. The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy. Even the States' salutary effort to redress private wrongs or grant compensation for past harm cannot be exerted to regulate activities that are potentially subject to the exclusive federal regulatory scheme.

Accord, Chicago and North Western Transportation Co. v. Kalo Brick & Tile Co., 450 U.S. 311, 325-327 (1981) (Iowa state common law damage awards constituted state regulation in conflict with preemptive federal regulatory scheme).

Barge owners choose to run larger barges for financial reasons. This increases the care that must be exercised in transiting the Clinton Railroad Bridge. Every barge owner knows of the necessity of passing through the Clinton Railroad Bridge. If a particular barge tow is too large, or

under-powered, to do so safely, it should not be sent on the voyage. Union Pacific gains no benefit from the use of larger barges, yet it is this modern-day development that resulted in the Truman-Hobbs Order to Alter. Nothing in the Truman-Hobbs Act evidences Congressional intent to penalize railroads for this development in the size of barges using the Mississippi.

The Eighth Circuit Panel's opinion states:

> We find that the Truman-Hobbs Act is a funding statute and not a safety statute. Congress stated that it drafted the Truman-Hobbs Act "to provide an orderly method for the just apportionment of the cost of the reconstruction or alteration of bridges over navigable waters where navigation conditions require such reconstruction or alteration of bridges heretofore built in accordance with law. . . . " House Report No. 1447, August 2, 1939, 76th Cong., 1st Sess.

Union Pacific, 296 F.3d at 674.

The Eighth Circuit Panel's opinion further states:

> Looking at the Truman-Hobbs Act as a whole, a § 512 finding that a bridge is an "unreasonable obstruction to navigation" is not a direct comment on the safety of the bridge. Instead, the Coast Guard labels a bridge an unreasonable obstruction in order to facilitate the funding process. Accordingly, we conclude that the Truman-Hobbs Act does not satisfy the first element of the Pennsylvania rule because it was not drafted to protect marine safety, but to establish a procedure to provide government funds to assist bridge owners in altering their bridges.

Union Pacific, 296 F.3d at 675.

The Coast Guard in issuing a Truman-Hobbs Order to Alter is implementing a legislative policy of facilitating appropriation of federal funds for reconstruction of bridges with no attendant financial penalty to railroads or governmental highway authorities. The Coast Guard's legislative mandate was *not* to decide whether the Clinton Railroad Bridge's 33 U.S.C. § 401 bridge permit should be revoked, thus rendering it vulnerable to a charge that the bridge owner was guilty of negligence in the design, construction or maintenance of the bridge. In carrying out its legislative policy directive, the Coast Guard issues a Truman-Hobbs Order to Alter only if it determines the value of benefits derived by the barge industry from reconstruction will exceed the amount of federal funds expended for the reconstruction. 33 C.F.R. § 116.30(c). In the present case the Coast Guard determined this requirement was met.

The cases cited by Kirby in its petition do not overcome the clear expression by Congress in the Truman-Hobbs Act that the Act is intended to increase federal funding for railroad and highway bridge reconstruction – not to work a change in the common law that will financially penalize railroads and local governments who own bridges spanning navigable waters. For example, the partial sentence Kirby quotes (at page 22 of its petition) from *Bunge Corporation v. M/V Furness Bridge*, 558 F.2d 790, 795 (5th Cir. 1977), is taken out of context. The Fifth Circuit Court of Appeals in the full context of the *Bunge* quote actually sets out the logic that compels placing a heavy burden of proof on a moving vessel striking a stationary object:

II. The Applicable Standard of Care

It is well established that there is a presumption of fault against a moving vessel that strikes a stationary object, such as a dock or navigational aid. Freeport Sulphur Co. v. S/S/ Hermosa, 368 F. Supp. 952, 953 (E.D.La. 1973); Brown & Root Marine Operators, Inc. v. Zapata Off-Shore Co., 377 F.2d 724 (5th Cir. 1967). "In admiralty, this presumption does more than merely require the ship to go forward and produce some evidence on the presumptive matter. The moving vessel must show that it was without fault or that the collision was occasioned by fault of the stationary object or was the result of inevitable accident". [FN3] Paterson Terminals, Inc. v. S/S/ Johannes Frans, 209 F. Supp. 705, 707 (E.D.Pa. 1962), citing Carr v. Hermosa Amusement Corp., Ltd., 137 F.2d 983, 985 (9th Cir. 1943). We have held that "(t)he burden is heavily upon the vessel asserting (the inevitable accident) defense. 'Such vessels "must exhaust every reasonable possibility which the circumstances admit and show that in each they did all that reasonable care required."' " Brown & Root Marine Operators, Inc., supra, 377 F.2d at 726. Furthermore, the presumption of negligence is amply supported by logic and experience:

"The common sense behind the rule makes the burden a heavy one. Such accidents simply do not occur in the ordinary course of things unless the vessel has been mismanaged in some way. It is not sufficient for the respondent to produce witnesses who testify that as soon as the danger became apparent everything possible was done to avoid an accident. The question remains, How then did the collision occur? The answer must be either that, in spite of the testimony of

> the witnesses, what was done was too little or too late or, if not, then the vessel was at fault for being in a position in which an unavoidable collision would occur." *Patterson Oil Terminals v. The Port Covington*, 109 F. Supp. 953, 956 (E.D. Pa. 1952).

558 F.2d at 794-795.

In *Board of Commissioners of the Port of New Orleans v. Gypsum Transportation Limited*, 263 So.2d 385 (La. Ct. App. 1972), *writ denied*, 266 So.2d 442 (La. 1972) (cited at pages 19 and 26 of Kirby's petition), a vessel struck a bridge that had never obtained a 33 U.S.C. § 401 permit. The court held that failure to secure a § 401 permit did not trigger application of the *Pennsylvania rule*. 263 So.2d at 389-390. The court in *Board of Commissioners* explained at 263 So.2d 390:

> In our opinion 33 U.S.C. § 401 is not directly designed to prevent allisions, but rather to give the government power of approval and supervision of structures which could constitute a hazard to navigation if improperly constructed or maintained. Violation of this statute by failing to obtain a permit does not necessarily result in a hazard to navigation, as would violation of a statute by failing to sound a fog horn or failing to exhibit proper lights.

In the present case Union Pacific had the 33 U.S.C. § 401 permit required by the Rivers and Harbors Act. The rationale of the *Board of Commissioners* court certainly would not lead to a conclusion that a Truman-Hobbs Act order to alter under 33 U.S.C. § 513 triggers application of the *Pennsylvania rule*. That court's reference in *dicta* to 33 U.S.C. § 512, rather than to 33 U.S.C. § 494 (which contains the same prohibition set out in § 512), was simply a

mistake by a court that did not fully understand the difference in the statutory scheme enacted in Subchapter I of Chapter 11 of Title 33 compared to the statutory scheme enacted in Subchapter II of Chapter 11 of Title 33 (Truman-Hobbs Act).[1]

In *State of Connecticut v. Tug Cynthia Moran*, 607 F. Supp. 24 (D. Conn. 1984) (Kirby petition, page 19, n.3), a railroad's bridge was not opened in time to allow a barge tow to pass. The court held this was a violation of its statutory duty to open the bridge in a timely manner, citing 33 U.S.C. § 494 and § 499 (drawbridge regulation), and 33 CFR § 117.125(b). 607 F. Supp. at 29 and n.1. The *Cynthia Moran* court also erroneously cited 33 U.S.C. § 512. *Id.*, at 29. Section 512 has nothing to do with failure to timely open a draw. The court in *Tug Cynthia Moran* did not even rely on the *Pennsylvania* presumption because it said the railroad's active negligence was the sole proximate cause as a matter of law. *Id.*, at 29, n.1.

The court in *Folkstone Maritime, Limited v. CSX Corporation*, 64 F.3d 1037 (7th Cir. 1995) (Kirby petition at page 23), cited 33 U.S.C. § 491; but it also erroneously cited 33 U.S.C. § 512, part of the Truman-Hobbs Act, instead of 33 U.S.C. § 494. Section 494 provides that "No bridge erected or maintained under the provisions of sections 491 to 498 of this title, shall at any time

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[1] Sections 401, 403 and 406 of Title 33 were enacted as part of the "Rivers and Harbors Act of 1899". Sections 491-498 of Title 33 were enacted as the "Bridge Act of 1906". Those two Acts are in Subchapter I of Chapter 11. The Truman-Hobbs Act, 33 U.S.C. §§ 511-524, was enacted in 1941 (§ 524 was added by amendment in 1952 to clarify application of the Administrative Procedures Act), and forms Subchapter II of Chapter II of Title 33.

unreasonably obstruct the free navigation of the waters over which it is constructed. . . ." Section 491 provides that a bridge permit is required for construction or alteration of a bridge over navigable waters. These sections govern non-Truman-Hobbs bridges. *See*, 33 U.S.C. § 522(a). The bridge in *Folkstone* was not a Truman-Hobbs bridge, as no Truman-Hobbs order to alter had issued. (*See* the Seventh Circuit's description of the history of the bridge at 64 F.3d 1043-1045, and the district court's more detailed history in *Folkstone Maritime, Limited v. CSX Corporation*, 1994 WL 96670, pp. 4, 12-13 (N. D. Ill. 1994)). The sole proximate cause of the allision in *Folkstone* was the bridge owner's negligent failure to maintain the bridge so it would open to 83 degrees as required by its § 491 permit. 64 F.3d at 1048-1049; 1994 WL 96670 at p. 13-15. Placing the burden of proof on the bridge owner in *Folkstone* resulted because of a failure to comply with the draw opening requirements of a § 491 permit – not because of the design or construction of a bridge operating according to the terms of a valid § 491 permit that has now become more difficult to navigate because barge owners have chosen to use much larger barges.

The *Folkstone* Seventh Circuit panel in fact applied the *Oregon* rule "that there is a presumption of fault against a moving vessel that allides with a stationary object." 64 F.3d at 1050; *see*, *Arkansas State Highway Commission v. Arkansas River Company*, 271 F.3d 753, 757 (8th Cir. 2001) (citing *Folkstone* for application of the *Oregon* rule). The *Folkstone* court also, however, explained that ". . . courts have recognized that, as a matter of pragmatic necessity, the *Oregon* rule is not susceptible to rigid application in the case of a drawbridge" 64 F.3d at 1050-1051. The court found no evidence of negligence on the part of the vessel and concluded: "Sufficient evidence

was presented by [the vessel] to overcome the presumption of fault when a moving vessel allides with a stationary object." 64 F.3d at 1055.

In *Nassau County Bridge Authority v. Tug Dorothy McAllister*, 207 F. Supp. 167 (E.D.N.Y. 1962), *affirmed*, 315 F.2d 631 (2nd Cir. 1963) (Kirby petition at page 27), the cause of the allision was the active negligence of the bridge operator who failed to timely signal the vessel that the draw would not be opened, in violation of 33 U.S.C. §§ 494 and 499. *Id.*, at 207 F. Supp. 170-171, 174. The court erroneously cited § 512 since no Truman-Hobbs order to alter had been issued. 207 F. Supp. at 171, 174. The Second Circuit held: "Affirmed on the opinion of Judge Abruzzo in concluding that the damage was caused solely by failure of the bridge tender to give a timely danger signal." 315 F.2d 631. The *Nassau* court in fact said there was no evidence the "bridge had not been maintained in proper operable condition." 207 F. Supp at 174.

In *Illinois Constructors Corp. v. Logan Transportation, Inc.*, 715 F. Supp. 872 (N.D. Ill. 1989) (Kirby petition at page 18), a vessel struck a cofferdam, which is a water-tight enclosure built into the riverbed and then pumped dry to facilitate construction of a bridge pier. The Coast Guard construction permit guidelines mandated certain lights and reflective tape to illuminate the cofferdam. 715 F. Supp. at 877. The court applied the *Oregon* rule placing the burden of proof on the vessel colliding with a stationary object. 715 F. Supp. at 879. The court then said, ". . . if any party violates a statutory or regulatory rule designed to prevent collisions, that party is guilty of per se negligence and, under the so-called '*Pennsylvania* rule,' has the burden of proving that its statutory fault was not a contributing cause of the accident. . . ."

The Court in *Illinois Constructors* then explained its analysis further at 715 F. Supp. 881:

> Both parties agree that ICC has established a prima facie case of negligence, since under the *Oregon* rule the *M/V Sunshine* is deemed to be presumptively at fault for striking the stationary structure. Moreover, both sides also agree (and this court finds) that Captain Williams was actually negligent in piloting the vessel, causing it to run aground on the sandbar and, ultimately, to strike the cofferdam.
>
> As the pilot, Williams was chargeable with knowledge of all navigational conditions reasonably ascertainable by mariners experienced in navigating a particular waterway. . . .
>
> Thus, not only has the plaintiff established a prima facie case of negligence, but the defendant concedes that Captain Williams negligently navigated the vessel. The issue, then, is whether ICC itself was negligent and whether its negligence should reduce its recovery.

The court then said the company building the pier had a duty to comply with the Coast Guard lighting guidelines and if its failure to do so contributed to the cause of the allision it would be contributory negligence. *Id.* The court, however, found no violation of Coast Guard guidelines was a cause of the allision. *Id.*, at 882. The *Illinois Constructors* court thus found the *Oregon* presumption applicable and the case supports the Union Pacific's position.

Thus, the cases cited by Kirby do not correctly address the statutory intent of Congress in enacting the Truman-Hobbs Act. The Act was intended to allow a federal subsidy for the barge industry by way of bridge reconstruction, and

to do so without adverse financial consequences to railroads and highway authorities. The Act was not intended to change longstanding judge-made law governing jury instructions at trials on vessel/bridge allisions.

CONCLUSION – RELIEF REQUESTED

Petitioner Kirby's petition for a writ of certiorari should be denied. Alternatively, if Kirby's petition is granted,

(1) an order of summary disposition on the merits should be entered under Rule 16 affirming the judgment below of the Eighth Circuit Court of Appeals on the *Oregon* issue; and

(2) Union Pacific's cross-petition for a writ of certiorari should be granted.

Respectfully submitted,

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33 U.S.C. 491. Approval of and deviation from plans; exemptions

When, after March 23, 1906, authority is granted by Congress to any persons to construct and maintain a bridge across or over any of the navigable waters of the United States, such bridge shall not be built or commenced until the plans and specifications for its construction, together with such drawings of the proposed construction and such map of the proposed location as may be required for a full understanding of the subject, have been submitted to the Secretary of Transportation for the Secretary's approval, nor until the Secretary shall have approved such plans and specifications and the location of such bridge and accessory works; and when the plans for any bridge to be constructed under the provisions of sections 491 to 498 of this title, have been approved by the Secretary it shall not be lawful to deviate from such plans, either before or after completion of the structure, unless the modification of such plans has previously been submitted to and received the approval of the Secretary. This section shall not apply to any bridge over waters which are not subject to the ebb and flow of the tide and which are not used and are not susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce.

33 U.S.C. § 495. Violations of orders respecting bridges and accessory works

(a) Criminal penalties for violation; misdemeanor; fine; new offenses; jurisdiction: suits for recovery of removal expenses, enforcement of removal, and obstruction-to-navigation causes or questions

Any persons who shall willfully fail or refuse to comply with the lawful order of the Secretary of Transportation or the Chief of Engineers, made in accordance with the provisions of sections 491 to 498 of this title, shall be deemed guilty of a misdemeanor and on conviction thereof shall be punished in any court of competent jurisdiction by a fine not exceeding $5,000, and every month such persons shall remain in default shall be deemed a new offense and subject such persons to additional penalties therefor; and in addition to the penalties above described the Secretary of Transportation and the Chief of Engineers may, upon refusal of the persons owning or controlling any such bridge and accessory works to comply with any lawful order issued by the Secretary of Transportation or Chief of Engineers in regard thereto, cause the removal of such bridge and accessory works at the expense of the persons owning or controlling such bridge, and suit for such expense may be brought in the name of the United States against such persons, and recovery had for such expense in any court of competent jurisdiction; and the removal of any structures erected or maintained in violation of the provisions of said sections, or the order or direction of the Secretary of Transportation or Chief of Engineers made in pursuance thereof may be enforced by injunction, mandamus, or other summary process, upon application to the district court in the district in which such structure may, in whole or in part, exist, and proper proceedings to this end may be instituted under the direction of the Attorney General of the United States at the request of the Secretary of Transportation; and in case of any litigation arising from any obstruction or alleged obstruction to navigation created by the construction of any bridge under said sections, the cause or question arising may be tried before the district court of the United States in

any district which any portion of said obstruction or bridge touches.

(b) Civil penalties for violation; separate offenses; notice and hearing; assessment, collection, and remission; civil actions

Whoever violates any provision of sections 491 to 498 of this title, or any order issued under sections 491 to 498 of this title, shall be liable to a civil penalty of not more than $1,000. Each day a violation continues shall be deemed a separate offense. No penalty may be assessed under this subsection until the person charged is given notice and an opportunity for a hearing on the charge. The Secretary of Transportation may assess and collect any civil penalty incurred under this subsection and, in his discretion, may remit, mitigate, or compromise any penalty until the matter is referred to the Attorney General. If a person against whom a civil penalty is assessed under this subsection fails to pay that penalty, an action may be commenced in the district court of the United States for any district in which the violation occurs for such penalty.

33 CFR § 116.30 Chief, Office of Bridge Administration Review and Evaluation.

(a) Upon receiving a Detailed Investigation Report from a District Commander, the Chief, Office of Bridge Administration will review all the information and make a final determination of whether or not the bridge is an unreasonable obstruction to navigation and, if so, whether to issue an Order to Alter. This determination will be accompanied by a supporting written Decision Analysis which will include a Benefit/Cost Analysis, including calculation of a Benefit/Cost Ratio.

(b) The Benefit/Cost Ratio is calculated by dividing the annualized navigation benefit of the proposed bridge alteration by the annualized government share of the cost of the alteration.

(c) Except for a bridge which is statutorily determined to be an unreasonable obstruction, an Order to Alter will not be issued under the Truman-Hobbs Act unless the ratio is at least 1:1.

(d) If a bridge is statutorily determined to unreasonably obstruct navigation, the Chief, Office of Bridge Administration will prepare a Decision Analysis to document and provide details of the required vertical and horizontal clearances and the reasons alterations are necessary.

(e) If the Chief, Office of Bridge Administration decides to recommend that the Commandant issue an Order to Alter, or a bridge is statutorily determined to unreasonably obstruct navigation, the Chief, Office of Bridge Administration will issue a letter to the bridge owner ("The 60-Day Letter") at least 60 days before the Commandant issues an Order to Alter. This letter will contain the reasons an alteration is necessary, the proposed alteration, and, in the case of a Truman-Hobbs bridge, an estimate of the total project cost and the bridge owner's share.

(f) If the bridge owner does not agree with the terms proposed in the 60-Day Letter, the owner may request a reevaluation of the terms. The request for a reevaluation must be in writing, and identify the terms for which reevaluation is requested. The request may provide additional information not previously presented.

(g) Upon receipt of the bridge owner's response, the Chief, Office of Bridge Administration will reevaluate the situation based on the additional information

submitted by the bridge owner. If after the Chief, Office of Bridge Administration reviews the determination, there is no change, the Commandant may issue an Order to Alter as set out in § 116.35. The Chief, Office of Bridge Administration's determination based on the reevaluation will constitute final agency action.